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SUPREME COURT, U. S

IN THE

Supreme Court of the United States

October Term, 1967

No. 405

LEROY POWELL,

Appellant,

v.

THE STATE OF TEXAS,

Appellee.

ON APPEAL FROM THE COUNTY COURT AT LAW
No. 1 OF TRAVIS COUNTY, TEXAS

MOTION OF NATIONAL COUNCIL ON ALCOHOLISM FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

PAUL O'DWYER,
50 Broad Street,
New York, New York 10004,
Attorney for Amicus Curiae.

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No. 405

LEROY POWELL,

Appellant,

v.

THE STATE OF TEXAS,

Appellee.

ON APPEAL FROM THE COUNTY COURT AT LAW
NO. 1 OF TRAVIS COUNTY, TEXAS

MOTION OF NATIONAL COUNCIL ON ALCOHOLISM FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

National Council on Alcoholism hereby respectfully moves for leave to file a brief as *Amicus Curiae* in the above-entitled case. Counsel for Appellant have consented to the filing of the attached brief. The consent of Counsel for Appellee was requested but refused.

The interests of *Amicus* and its reasons for requesting leave to file a brief are set out at pages 3-4 of the attached brief.

Respectfully submitted,

PAUL O'DWYER,
50 Broad Street,
New York, New York 10004,
Attorney for Amicus Curiae.

December 15, 1967

IN THE

Supreme Court of the United States

October Term, 1967

No. 405

LEROY POWELL,

Appellant,

v.

THE STATE OF TEXAS,

Appellee.

ON APPEAL FROM THE COUNTY COURT AT LAW
No. 1 OF TRAVIS COUNTY, TEXAS

BRIEF OF NATIONAL COUNCIL ON ALCOHOLISM AS *AMICUS CURIAE*

Question Presented

Whether Article 477 of the Texas Penal Code violates the Fourteenth Amendment to the United States Constitution.

Interests of *Amicus Curiae*

This case presents the question of the validity of the penal approach to the problem of skid row derelicts.

The Appellant argues that Article 477 of the Texas Penal Code is in violation of the Constitution of the United States. His argument and the rationale of recent decisions [1]

[1] *Driver* v. *Hinnant*, 356 F. 2d 761 (4th Cir. 1966) and *Easter* v. *District of Columbia*, 361 F. 2d 50 (D.C. Cir. 1966).

on which the argument is based is predicated on the fact that such legislation is a violation of the Eighth and Fourteenth Amendments to the United States Constitution as applied to alcoholics.

The National Council on Alcoholism is of the opinion that the Texas statute is fundamentally invalid and in violation of the Fourteenth Amendment to the Constitution *as applied to all individuals* because public intoxication arrests are status arrests and, as such, invalid under the Fourteenth Amendment. It is believed that, if the rationale of Appellant is adopted as the basis for reversal, the already confused law as to intoxication as a defense to a criminal prosecution will be further confused. It is believed desirable to have a different rationale, that urged by the National Council on Alcoholism, presented to the Court for consideration in the disposition of this case.

The National Council on Alcoholism, organized in 1944, is a national association concerned with the problem of alcoholism. The National Council on Alcoholism has over eighty affiliates throughout the United States that disseminate information regarding alcoholism and direct those afflicted with the disease to treatment. Because of its interest in the problem of alcoholism, it is concerned with the defense of intoxication and the law's approach to the problem of intoxication.

Summary of Argument

While drunkenness may be the occasion for a public intoxication arrest, human inadequacy is the gravamen of the offense. Fundamentally, public intoxication arrests are not arrests for drunkenness or intoxication. They are status arrests. The punishment of the harmless and unfortunate derelict because of his condition is a violation of the due process clause of the Fourteenth Amendment to the United States Constitution.

Argument

Amicus urges the reversal of the conviction of Appellant. It prefers, however, to see this result attained on a more fundamental rationale than that urged by Appellant and that advanced by the courts in the *Driver* and *Easter* cases.

The reasons for the position of *Amicus* are set forth convincingly and in detail by Mr. Justice John M. Murtagh of the Supreme Court of the State of New York in two recent law review articles.[2]

Traditionally, proof of an *actus reus* and *mens rea* are essential to a criminal conviction. The rationale of the opinions in the *Driver* and *Easter* cases presupposes that a public intoxication statute is directed at an *actus reus* and a *mens rea*. The opinions then proceed to broaden the defense of intoxication by saying that in the case of a chronic alcoholic there is no volition and, hence, no *actus reus*.

This rationale overlooks the fact that the gravamen of a public intoxication statute is neither an *actus reus* nor a *mens rea* but rather a status, the status of human inadequacy.[3]

Public intoxication statutes providing for status arrests violate the Fourteenth Amendment to the United States Constitution.[4] *This is true whether the person arrested is a chronic alcoholic or not.*

The traditional defense of intoxication in criminal cases is confused and difficult to support as a matter of abstract logic.[5] The rationale of the *Driver* and *Easter* cases by broadening the defense as to public intoxication arrests in

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[2] Murtagh, 35 Fordham L. Rev. 1 (1966); Murtagh, 36 Fordham L. Rev. 51 (1967).

[3] *Fenster* v. *Leary*, 20 N.Y. 2d 309 (1967); Murtagh, 36 Fordham L. Rev. 51, 58 (1967).

[4] See *Robinson* v. *California*, 370 U.S. 660, 677-78 (1962) (Douglas, J. concurring); Murtagh, 36 Fordham L. Rev. 51 (1967).

[5] Hall, *Intoxication and Criminal Responsibility*, 57 Harv. L. Rev. 1045 (1944).

the case of chronic alcoholics adds further confusion to an already confused doctrine.

Also, from a pragmatic standpoint, the *Driver* and *Easter* cases are not contributing to a solution of the important problem of the skid row derelict. In February of this year the President's Commission on Law Enforcement and Administration of Justice issued a report entitled The Challenge of Crime in a Free Society.[6] This report noted that, although one-third of the arrests and convictions in America each year are for public intoxication, "almost everyone in the criminal justice system and out of it has recognized that the criminal process is an irrational means of dealing with drunks."[7] Following the *Easter* decision, there was a sharp increase in arrests for public intoxication in the District of Columbia.[8] In contrast, in New York City the Police, at the instance of the judiciary, have abandoned all such arrests.[9] Traditionally, such arrests had amounted to 30,000 annually in New York City.[10]

CONCLUSION

For the reasons stated above *Amicus* urges that the judgment of the court below be reversed on the ground that the arrest was a status arrest and, as such, in violation of the Fourteenth Amendment to the United States Constitution.

Respectfully submitted,

PAUL O'DWYER,
50 Broad Street,
New York, New York 10004,

Attorney for Amicus Curiae.

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[6] President's Commission on Law Enforcement and Administration of Justice, The Challenge of Crime in a Free Society (1967).

[7] *Id.* at 14.

[8] Chapter 7, Section 1, Report of the President's Commission on Crime in the District of Columbia.

[9] Murtagh, 36 Fordham L. Rev. 51, 56 (1967).

[10] Murtagh, 35 Fordham L. Rev. 1, 5 (1966) footnote 33.